The Sinister Precedents in The New "Second String" Smith Act Ruling, Page 2

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Why I Cast My Vote for Ike

I believe that the United States and the world will be better off if the Republicans stay in power a little longer. I think this important for two reasons, one in the sphere of foreign policy, the other domestic.

The overriding issue is that of peace. If the Democrats had been in power we might still be at war in Korea, we might have been drawn into open intervention in Indo-China. Despite Dulles and Radford, Knowland and Nixon, the Eisenhower Administration did end the fighting in the one place and keep out of the fighting in the other. Adlai Stevenson said at San Francisco on October 16, "While the President talks about peaceful co-existence with the Communists, Senator Knowland talks of war with Red China. When he publicly demands that we sever diplomatic relations with Russia, the President has to issue a quick and angry 'No'." The point Stevenson dodges is that Eisenhower *does* make the final decision for co-existence.

Adlai, Too, Grows Reckless

While Stevenson endorses what Dulles did in Guatemala, applauds the rearmament of Germany and hails the SEATO pact, he talks vicious nonsense about Indo-China, saying of the peace that there "the free world suffered its greatest disaster since the fall of China." He says irresponsible Republican talk has made our allies afraid of American recklessness. They can be no less afraid to hear Stevenson talking of "the growing attraction of *monstrous* China" and saying as he did in that same speech at San Francisco, "But co-existence with our obnoxious, aggressive and perfidious neighbors can never be peaceful." Nor can they be less worried when they hear Stevenson declaring in the best Acheson-Truman tradition, "Negotiation without strength, which some of our European friends seem to want, is madness."

Of course, "negotiation without strength" would be "madness" but no one is proposing any such negotiation. The U.S. and the West are hardly "without strength." Behind the Stevenson phrases is masked quite a different policy. "Negotiating from strength" was really a policy of speeding up an armament race *instead of negotiating*. Its hope was for unconditional surrender not negotiation. That was really madness in today's world. I much prefer to it what Eisenhower said here at Catholic University last November, "Those who seek peace in terms of military strength alone, I am certain are doomed to end up in the agony of the battlefield."

The Democratic leaders are so obsessed with the need to clear themselves of any suspicion of Communism, they and the trade union leaders supporting them are so ready to relapse into an arms race as an easy means of pump-primng that they have become the war party. Thus the 1954 Democratic Fact Book for the campaign criticizes Eisenhower, not for his dramatic order 13 days after inauguration "unleashing" Chiang but for the secret agreement which followed requiring Chiang to "stay put on Formosa." The G.O.P. is criticized because it "refused even to send planes to aid France in the Indo-China war."

The Democrats are as unwilling out of power as they were in power to seek, recognize or welcome relaxation of tension. The Korean peace, the Indo-Chinese settlement, a Russian policy so changed that Moscow is willing even to co-exist with its own arch heretic and ex-satellite Tito—all these do not exist for the Democrats. The Administration by contrast has been easing up on East-West trade to the extent of removing 600 items from the embargo list and challenging Moscow (see the speech last Tuesday in Boston of the Deputy Assistant Secretary of International Affairs) to permit a "substantial increase" in trade across the Iron Curtain! It would be better if the Republicans stayed in power long enough to permit the tide toward peace to become stronger.

The give-away issue does not impress me because the Democrats are as bad as the Republicans in the greatest give-away of all—the give-away of our fundamental liberties and safeguards in the witch hunt. The Democrats boast of their Smith Act prosecutions, of their part in framing the new anti-Communist legislation and of their record in enlarging the FBI. The Bill of Rights is a more precious heritage than tidelands oil, TVA or Hell's Canyon. Here there is little to choose between the two parties, except that so many of the Democrats are "liberals" and therefore are to be judged more harshly. I am convinced that if peace is achieved, the miasma at home will clear up since its roots are fed by the Great Power struggle between U.S. and U.S.S.R. and draw no real sustenance from domestic issues.

Cutting McCarthy Down to Size

This brings me to the second reason why I prefer to see the Republicans stay in a little longer: McCarthy and the wild men. So long as the G.O.P. was out of power, it was content to use these Fascist demagogues against the Democrats. Once in power, it was forced to fight them—not because it wanted to, but because men like McCarthy are out for complete power. Their temperament must bring them into collision with whomever is in power. The G.O.P. has been forced to begin to cut McCarthy down to size and to downgrade his Senatorial supporters. It is an asset in the struggle against McCarthy to have it fought out within the Republican party instead of between the two parties. When McCarthy has been put in his place and peace more firmly established, Democrats could safely come back and pick up where the New Deal left off.

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The Press Is Silent As Sinister Precedents Are Set

The Danger to Liberty in The New Smith Act Decision

Few people in this country are any longer intrepid enough to defend the rights of actual Communists. Most Americans thoughtful enough to understand nervously look the other way, as good Germans looked the other way when some poor Jew was being set upon by Brown Shirts.

Those few liberals who still command an audience on the air or in the press confine themselves to cases of mistaken identity, or the defense of persons with so "spotless" a past as to be virtual political idiots or to plead for forgiveness of those so foolish as to have been somewhat radical in the past.

This may help us to understand how the Spanish Inquisition, despite many ups-and-downs in the earlier years, established itself so firmly. There were men brave enough and politically powerful enough to defend, and sometimes to save, the *wrongly* accused. But no one defended the right to be a heretic. The opponents of the Inquisition acquiesced in its basic principles. And so it is in America today.

Yet it is as true today as it was then that the evils of the Inquisition, the distrust it spread between man and man, the terrible penalties it imposed for the slightest appearance of non-conformity, the pall it cast upon society, could only be fought by asserting the right of men to think and worship as they pleased, however dangerous or subversive that might appear to the majority.

The occasion for these reflections is the silence which has greeted the decision of the U. S. Circuit Court of Appeals last week upholding the conviction of Elizabeth Gurley Flynn and the "second string" Communist leaders under the Smith Act.

Against McCarthyism But—

Consider: Three New York City newspapers, the *Times*, the *Post*, and the *Wall Street Journal* have been critical of many aspects of the witch hunt. Two others, the *Herald-Tribune* and the *World-Telegram*, have been critical of McCarthy. Yet not one of them has examined this decision and discussed its implications for the basic liberties they have defended from time to time in their respective fashions.

True, it is about as arid and dreary an opinion as any editor was ever called upon to read. But it is arid and dreary because so many fundamental battles of principle have been lost in these Smith Act cases that the defense was pushed back into the murkier regions of legal metaphysics.

The main argument centered around the fine spun question of intent. How is intent to be determined in a prosecution for conspiracy where without proof of individual intent the statute would concededly be invalid? The discussion of this in the briefs and the opinion is as abstruse as medieval argument about the number of angels who could dance on the head of a pin.

The other, simpler, question was when danger becomes so "clear" and "present" that Congress may punish men for their utterances despite the First Amendment? No medieval schoolman could have been more wily in his dialectics than our judges in reading that Amendment as if it restricted the liberties it was supposed to protect.

Both these questions involve every one's freedom. The answers given to them by the Circuit Court weaken traditional safeguards of political liberty and fair trial. This, briefly stated, is how they do so.

A Law Aimed at "Dangerous Thoughts"

The Smith Act, under which these Communists were tried, makes it a crime (1) to advocate revolutionary doctrines, (2) to "print, publish, edit, issue, circulate, sell, distribute or publicly display" any such writings, (3) to organize, join or "affiliate with" any group which teaches such doctrines or (4) to "conspire" to do any of these things.

The law is so loosely drawn that only under (2) does it require that there be intent to overthrow the government. Without the intent clause, it would be a crime to publish the Declaration of Independence.

Beginning with Judge Medina, the courts held that as written the Act was defective, and must be read as if it required "intent to overthrow" in all cases. Otherwise a college teacher discussing Marx with his pupils would be in danger of prosecution under the Smith Act.

How prove intent? Here it gets complicated. It is complicated first of all by the fact that none of these people were convicted of advocating revolution.

Where the government cannot prove that a crime is committed, it often falls back on the easier task of alleging that there was a "conspiracy" to commit the crime at some later date. So these people were convicted of conspiring at some future date to advocate overthrow of the government.

Short-Circuiting Normal Rules of Evidence

Now one of the advantages of a conspiracy prosecution is that ordinary rules of evidence are short-circuited. It becomes possible to prove one person's intent by what some other member of the alleged conspiracy said.

Here for example one of the proofs of intent was what Harvey Matusow testified that he heard a Beatrice Siskind say in 1948 in teaching a class in political economy. Miss Siskind was not a defendant, and there was no proof that any of the defendants knew what she was teaching.

We cannot enter into the subtleties of the argument. But we will pause a moment to summarize it for lawyer readers. Others may skip it.

The defense brief by Mary Kaufman and Harry Sacher brilliantly argued that the rule allowing third party statements to be admitted as evidence of state of mind in conspiracy prosecutions rested on a "fiction" derived from the law of agency (Holmes), that "such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime" (Learned Hand) and that they cannot be used in this type of prosecution, where the statute would be invalid under the First Amendment unless actual individual intent to overthrow were proven. The Circuit Court rejected this argument.

All this far-fetched hair-splitting adds up to something very serious. If this decision stands, then someone who has helped advance a Communist cause may be in danger of prosecution as a co-conspirator even though he was not a member. And his criminal intent to overthrow the government may be inferred from remarks or writings of which he may never have been aware.

No Longer "Clear" or "Present"

We come now to the second point. For 30 years, until these Smith Act cases, the courts had held that expressions of opinion could not be punished as sedition or seditious conspiracy unless there was really a "clear and present danger" to the government.

In the first Smith Act cases, Judge Learned Hand (and later the Supreme Court) changed this to the much vaguer rule, "In each case [courts] must ask themselves whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

But in this "second string" prosecution, the Circuit Court last week went further. It said the "clear and present danger" rule "connotes no more than that the setting in which the defendants have conspired is such as to lead reasonably to the conclusion that their teachings *may* result in an attempt at overthrow."

In other words, the danger need be neither "clear" nor "present"—it need only be potential—to warrant Congress and the courts in abridging freedom of speech and of the press. Some day the country will wake up to these sinister precedents, but perhaps too late.

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A Quick Look 'Round the Capitol and Globe

Some Personal Choices in the Election: If we were in California, we'd vote for Condon and against Sam Yorty; in Oregon, for Dick Neuberger; in Idaho, for Glen Taylor; in Minnesota, against Hubert Humphrey; in Illinois, against Paul Douglas, not only because of his betrayal of liberalism on repressive legislation but because of his consistent pro-war attitudes; in Kentucky, for John Sherman Cooper, in many ways the best libertarian in the Senate; in Tennessee, for Kefauver; in Pennsylvania, for George M. Leader, the Democratic State Senator now running for Governor, who voted against the Pechan "loyalty" Act and didn't apologize for it; in New Jersey, for Case, to strengthen the anti-McCarthy liberals in the Republican party; in New York, we'd split our ticket several ways, casting a protest vote for McManus on the ALP ticket, a vote for Javits for Attorney General as one of the genuinely liberal Republicans, and if we were in that district, for Elizabeth Gurley Flynn, just as a way of voting against the Smith Act, and for a grand old lady who used to be a Wobbly and still carries over some anarchistic salt and savor among the often insufferably pious Reds.

We'd vote for every one of the 55 Congressmen who voted against the immunity bill (you can find their names in our August 16 issue); for Burdick of North Dakota and Multer of Brooklyn, the only two Congressmen to vote against the new anti-Communist control legislation, and of course for "Manny" Celler of Brooklyn who worked so hard and fought so hard on so many liberal issues. One of the best things about the expected Democratic victory in the House is that Celler will again become chairman of the Judiciary Committee.

Why Withheld So Long? Notice that just released testimony by Vannevar Bush, John von Neumann and others criticizing security standards for scientists was given before the House Government Operations Committee last June. The Gray board decision on Oppenheimer became known at the beginning of June, the AEC decision against him was handed down at the end of June. Though this had an important bearing on the issues, it was withheld four months until public discussion of the Oppenheimer case had died down.

McCarthy: Under guidance from his lawyer, Edward Bennett Williams, who is also an A.F. of L. attorney, may be trying out a "new look" for the coming fight over censure. On the air the other night he was the grave elder statesman, above the battle, loyal to his party, though hurt by attacks, sorry (as he hopes) that it will be defeated in the election, concerned over farm prices, ready (if only asked) to lead the Republicans out of the wilderness . . . The "Adelaide Case" affair (there now seem to have been three of her) shows, however, that Low Blow Joe is still at the same old business,

Portrait Of A Liberal Statesman

"The most extreme example of this liberal conformism is the new anti-Communist law which goes far further in its threat to civil liberty than anything McCarthy proposed—promoted by two of the most eminent liberal Democrats, Senators Humphrey and Paul Douglas.

"When I asked Douglas about this measure, he replied very fiercely that the Republican party does not really want to destroy the Communist Party. 'They keep it in existence,' he said, 'and use it to smear Democrats like myself. We liberals must destroy the Communists if this dirty game is to stop.'

"Is it unfair to suggest that his attitude is not unlike that of the Germans in the late 1920's who tolerated Jew-baiting in order to preserve the Weimar Republic?

—*R. H. S. Crossman: "The Plight of American Liberalism," the London New Statesman and Nation, Oct. 16.*

BULLETIN

Washington—The price being demanded by the British, French and Germans for ratification of the German rearmament agreement is a renewal of negotiations with Moscow for reunification of Germany. The Europeans, including Churchill, want a Big Four meeting with Malenkov. The State Department is trying to stave off pressure by agreeing to a meeting instead of the Council of Foreign Ministers. Whether the meeting of heads of state comes off or not, the Foreign Ministers are now expected to meet late this year or early in January.

and that there is some kind of underground among the witch hunters which enables them to pool their files for smear purposes when dirt is wanted against somebody they have marked for political destruction.

Petersen: There are indications that the arrest by the FBI of the "secret code" expert, Petersen, was intended to provide a background for the coming McCarthy censure fight, sensationally illustrating the "infiltration" of military security agencies as often charged by Joe. The case, however, is already fizzling out, and may collapse altogether, despite that advance ballyhoo about secrets so secret the prosecutor had to go through special clearance before he was allowed to know what it was all about. If this sort of nonsense continues, we'll live to see cases so "secret" they'll be heard in star chamber before specially cleared judges, guaranteed (unlike Youngdahl) to have the right biases.

Coincidence Dept.: Neither side of the Iron Curtain seems to have a monopoly of peoples living in wonderful unanimity. Recent elections in East Germany, like those in Guatemala, brought in a 99 percent verdict in favor of the government . . . Washington is worried by the sudden friendliness of Radio Moscow to Turkey . . .

Liberation in Korea: Walter Simmons, the Chicago Tribune correspondent, visited New Hope Village in a portion of North Korea above the 38th Parallel which is under Rhee's control, and reported "American military police have to drive through the streets of New Hope Village every half hour to keep pillaging South Korean soldiers out." The article was headed, "South Korean Army is Tough on Own People. It Preys on Refugees Who Return Home."

Hopeful Note: The admission in Budapest October 14 that "many" people there had been jailed on false charges by secret police using "criminally improper and provocative methods and false charges and statements" and the reappearance in Hungarian public life of many "purged" officials, some of them condemned in the Rajk trial.

Contempt: The three new "first amendment" contempt indictments against Lamont, Unger and Shadowitz will depend in large part on the outcome of the Harvey O'Connor case. O'Connor was to go on trial after the Supreme Court had heard the reargument of the Emspak case and decided that. But last week the Court took the Emspak case off the calendar until a new judge is appointed to succeed Jackson. One of the latter's last judgments was that in which the court reinstated Abe Isserman in the Supreme Court bar and granted a rehearing on his disbarment in New Jersey. Isserman is the second of the two lawyers—the other was Harry Sacher—disbarred in the wake of the first Foley Square Smith Act trials whose reinstatement to practice was thus indicated by the Court.

Next Week: As we go to press (Thursday morning) the new anti-Communist law and its impact on the Internal Security Act were about to be argued in Circuit Court here today and the Youngdahl bias motion in the Lattimore case tomorrow. Watch next week's issue for coverage.

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What Senator Mansfield Failed to See In Indo-China

How Expect Corruptionists to Correct Social Inequity?

On October 15 Senator Mike Mansfield (*D., Mont.*) released a report on his recent visit to Indo-China. The report was given little attention by most papers, and did not even make the pages of the *New York Times*. It is a gloomy document.

The observers, diplomatic and military, on whom our government relies obviously are not competent. The Senator notes that when he was in Indo-China a year ago "experienced observers" were "almost unanimous" in predicting that joint Franco-American-Vietnamese efforts "could serve to check the Communist drive." The U. S. spent $2,600,000,000 in the fiscal years 1950-54 on that bad guess.

As in China, a substantial portion of these sums ultimately went to help the Communists. Some 25 percent was invested in the areas which have been ceded to them, including improvements at the Hanoi airport where we built a runway big enough to "handle heavy bombers capable of striking at our bases in the Philippines."

"None . . . Is Broadly Based in the People"

South Vietnam is in a political crisis and the situation there "could give way to complete internal chaos" even before elections are held in 1956 under the Geneva agreement.

The Senator writes, "There is still the same short-sighted struggle for immediate gain among the various political groups, sects and factions. Each of these elements possesses some aspects of power in its organization, armaments or heritage of authority. *None, however, is broadly based on the people.*" (Italics added.)

Senator Mansfield pictures Saigon the capital of South Vietnam, as seething with intrigue: "The political plotting goes on in army circles, government circles . . . and even in the demi-monde of ill-disguised gangsters, pirates and extortionists."

The head of the government, Diem, is praised by Mansfield but is described as "a virtual prisoner in his residence." His program calls for "the elimination of some of the most brazen aspects of corruption and social inequity" but this "remains largely a paper program." Note the word "some."

The Prime Minister does not control the Army "nor does he have power over the Sureté or the police in the Saigon-Cholon area." The reason is that "by special arrangement with Bao Dai, the latter two are operated by the Binh Xuyen, a demi-monde organization which also controls gambling, and other questionable concessions in Saigon-Cholon." In other words, Bao Dai farmed out control of the police in the capital to the ring which operates its vice resorts.

The Prime Minister depends for support on "a tenuous alignment with two quasi-religious sects, the Cao Dai and Hoa Hao, each of which has a military force of some thousands of men responsive to its command." The kind of "religious" these are is indicated by a biographical sketch of the Hoa Hao leader to be found in the appendix (p. 45). This says of him, "He has a long police record of thefts and assaults, dating from his days as river-boat skipper or pirate and head of a gang of local ruffians."

How Square the Circle?

Senator Mansfield repeats from his last year's report that the basic problem is for the non-Communist government "to put down firm roots" among the people. He says this can only be done "if they deal competently with such basic problems as illiteracy, public health, excessive population in the deltas, inequities in labor and in land tenure, and village and agricutural improvement. Finally, it is essential that there be a constant raising of the ethical standards of government."

Here even our best observers like Mansfield firmly shut their eyes. Although Madison and Hamilton did, it is not respectable in America today to analyze situations in terms of economic classes. Nor to recognize that some things can only be accomplished by revolution. Revolution is a dirty word in America, except possibly on July 4.

But isn't it folly to expect rotten old brooms to sweep clean? Where the "Emperor" himself draws profit from the vice rackets, how fatuous to lecture his government on raising ethical standards? And how expect political factions whose only base is among the native usurers, landowners and capitalists to correct "social inequity"?

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